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No. 74-5176

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

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DANIEL EDWARD HENRY, ET AL., PETITIONERS

v.

J. WILLIAM MIDDENDORF, II, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

ROBERT H. BORK,
Solicitor General.

Department of Justice,
Washington, D.C. 20530.

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In February, 1973, petitioners--then members of the United States Marine Corps who had been convicted and sentenced by summary courts-martial or were awaiting trial by summary courts-martial--brought this class action in the United States District Court for the Central District of California challenging the authority of the military to try them at summary courts-martial without providing assistance of counsel. The district court determined that in light of Argersinger v. Hamlin, 407 U.S. 25--in which this Court held that the Sixth Amendment prohibits imprisonment for misdemeanors or petty offenses unless the accused has been represented by counsel or has waived that right--accused servicemen at summary courts-martial must be

provided the opportunity to be represented by counsel. The court granted substantially all the requested relief, including the release of those petitioners who were then confined and an injunction (of world-wide scope) prohibiting the Navy and Marine Corps from conducting summary courts-martial resulting in confinement unless the accused servicemen were advised of their rights under Argersinger and unless, in the absence of waiver, they were provided counsel both prior to and during the court-martial proceedings (357 F. Supp. 495).

While this case was on appeal, the Ninth Circuit decided Daigle v. Warner, 490 F.2d 353.[1/] There, the court ruled that this Court's holding in Argersinger did not apply to summary courts-martial, but that the Due Process clause of the Fifth Amendment did require counsel to be made available to the accused at summary courts-martial under some circumstances.[2/] Accordingly, the Ninth Circuit in the instant case vacated the orders and judgment of the district court and remanded for reconsideration in the light of Daigle.

1/ A petition for a writ of certiorari was filed by some of the servicemen in that case sub nom. Crosby v. Middendorf, No. 73-6542. We are sending petitioners a copy of our memorandum acquiescing in that petition.

2/ Adopting the due process standards for revoking probation set forth in Gagnon v. Scarpelli, 411 U.S. 778, with special reference to military exigencies, the court of appeals held (490 F.2d at 365):

> [C]ounsel must be appointed for the accused before a summary court-martial only where the accused makes a request based on a timely and colorable claim (1) that he has a defense, or (2) that there are mitigating circumstances, and the assistance of counsel is necessary in order adequately to present the defense or mitigating circumstances. Moreover, even when such a request is made, if, due to the exigencies of military operations, qualified counsel is not reasonably available, the military may nevertheless proceed if the rights of the accused will not be unduly prejudiced.

On August 20, 1974, the accused servicemen filed this petition for a writ of certiorari, in which they contend that both the Fifth and Sixth Amendments require the military services to provide counsel to an accused in any summary court-martial which may result in imprisonment. On August 24, 1974, the government also petitioned for a writ of certiorari in the instant case. J. William Middendorf v. Daniel Edward Henry, No. 74-175. In that petition we assert that the Constitution does not require, under any circumstances, that the military services provide counsel to an accused in a summary court-martial. We also argue that the Ninth Circuit, by allowing Daigle to control the disposition of this case, improperly gave that decision retroactive effect.

We incorporate here what we said in that petition, which sets forth in greater detail the facts of this case and explains why it is important for this Court to resolve the issues there presented. We believe that our petition fairly raises all the relevant issues. But should this Court conclude that since the court of appeals agreed with our contention that the Sixth Amendment does not apply to summary courts-martial, the government's petition does not properly present the Sixth Amendment issue, the instant petition should be granted to preserve that question. Cf. Strunk v. United States, 412 U.S. 434.

If the instant petition is granted, the grant should be limited to questions 1 and 2 which involve petitioners' Fifth and Sixth Amendment claims. Their additional questions

presented, whether a district court may, by writ of mandamus or habeas corpus, "extend the scope of its judgment beyond the territorial limits of its district" (Pet. 2-3) should be denied. This issue was not treated by the court of appeals and therefore should not be addressed by this Court. See Parker v. Levy, No. 73-206, decided June 19, 1974, slip op. 27. In any event, a district court does not have that power. See Schlanger v. Seamans, 401 U.S. 487; Ahrens v. Clark, 335 U.S. 188.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.